UNITED STATES OF AMERICA

BEFORE THE

DEPARTMENT OF INTERIOR

MINERALS MANAGEMENT SERVICE

The Open and Non-Discriminatory	)
Movement of Oil and Gas as	)
Required by the Outer Continental	)
Shelf Lands Act	)

INITIAL COMMENTS OF SUPERIOR NATURAL GAS CORPORATION AND WALTER OIL & GAS CORPORATION

Pursuant to the Minerals Management Service's ("MMS") Advance Notice of Proposed Rulemaking and Announcement of Public Meetings ("Advanced Notice") published in the Federal Register on April 12, 2004, Superior Natural Gas Corporation ("Superior") and Walter Oil & Gas Corporation ("Walter") hereby provide these initial comments on the issues raised by the Advanced Notice.[1] In support of these initial comments, Superior and Walter hereby respectfully state as follows:

I.

Background

In the Advanced Notice, the MMS stated its intent to explore whether it should amend its regulations regarding how the Department of Interior ("DOI") should ensure that pipelines transporting oil and gas across the Outer Continental Shelf ("OCS") "provide open and non-discriminatory access to both owner and non-owner shippers" as required by Section 5(f) the Outer Continental Shelf Lands Act ("OCSLA"). The Advanced Notice particularly focused on how "open and non-discriminatory access"

[1] Superior and Walter hereby reserve the right to file additional comments in response to any comments received by the MMS from other parties.

should be defined in the context of any proposed rulemaking proceeding. The Advanced Notice raised several issues related to this core question, including how the recent opinion by the U.S. Court of Appeals for the District of Columbia Circuit in *Williams Cos. v. FERC*, 345 F.3d 910 (D.C. Cir. 2003) ("*Williams*"), prompted and shaped the MMS' inquiry.[2] The MMS requested that interested parties provide written comments to the MMS addressing the issues and questions presented in the Advanced Notice.

To assist it in its deliberations, the MMS held a series of three meetings; one each in Houston, New Orleans, and Washington D.C. The Advance Notice stated that:

> The MMS is committed to making changes that reflect the Secretary's "4C's" philisoph6 of "consultation, cooperation, and communication all in the service of conservation." Advanced Notice at 1.

II.

Superior and Walter's Interest in this Proceeding as it Applies solely to Natural Gas

Superior is a shipper and marketer of natural gas in the OCS and the shallow state waters of the Gulf of Mexico. Superior provides producer related services including but not limited to the marketing of natural gas on behalf of Walter, as well as from other third-party producers and suppliers.

Walter explores, develops, and produces gas and oil in various producing regions in the United States, including in the OCS and the shallow state waters of the Gulf of Mexico.[3]

[2] According to the Advanced Notice, the Court in *Williams* held that the Federal Energy Regulatory Commission ("FERC") has "only limited authority to enforce open-access rules on the OCS." Advanced Notice at 2.

[3] Walter intends to file separate written comments on the Advanced Notice as it may pertain to oil production and transportation activities on the OCS.

In light of their business activities on the OCS, Superior and Walter have a direct interest in any potential rulemaking proceeding initiated by the MMS concerning the implementation of open-access rules and/or reporting requirements for OCS activities.

In addition to the aforementioned interests, Superior and Walter were parties to the complaint proceedings against Transcontinental Gas Pipe Line Corporation ("Transco") and certain of its affiliates[4] in Docket Nos. RP02-99-000 and RP02-144-000, which complaints culminated in the FERC's orders issued addressing such complaints.[5] There apparently was extensive discussion at the three policy workshops held by the MMS concerning this complaint proceeding and how it might guide the MMS' own rulemaking efforts in this proceeding.

III.

Comments

As a threshold matter, Superior and Walter believe that the actual scope of the Court's opinion in *Williams* must be considered before the MMS institutes any rulemaking proceeding related to the OCSLA. The MMS stated in the Advanced Notice:

> In *Williams*, the Court held that Sections 5(e) and 5(f) of the OCSLA "do not grant the FERC general powers to create and enforce open access rules on the OCS, but merely assign it a few well-defined tasks. *Mimeo* at 11.

What the Court was addressing was whether Sections 5(e) and 5(f) of the OCSLA provided the FERC with the requisite authority to require, through a generic rulemaking proceeding, that all pipelines providing either transportation and/or gathering services on the OCS periodically report their pricing and service structures to the FERC. The Court

[4] Williams Gas Processing – Gulf Coast Company, L.P., Williams Field Services Company, and Williams Gulf Coast Gathering Company, L.L.C. (collectively, "Williams").

[5] *Shell Offshore Inc. v. Transcontinental Gas Pipe Line Corp., et al.*, 100 FERC P61,254 (2002), order on reh'g, 103 FERC P61,177 (2003), notice of denial of reh'g, 104 FERC P61,083 (2003). Superior and

held that Sections 5(e) and 5(f) could not be read to "provide FERC with a general power to enforce OCSLA's open access provisions." *Mimeo* at 7.

However, the Court did not hold that the FERC lacked jurisdiction under the OCSLA to promote open-access in the presence of specific factual circumstances warranting such action. As the FERC, itself, stated in *Shell v. Transco, et al.*:

> However, the Court leaves intact the Commission's authority to pursue remedies under the OCSLA where the Commission has ruled, as is the case in the current proceeding, "in the context of an adjudicative proceeding, where certain conduct violates the open access provision of the OCSLA." 103 FERC at P61,677 (*Mimeo* at 26(n. 92)).

Thus, while the Court's action in *Williams* rejected the FERC's attempt to **generically** require broad, general reporting requirements to promote open-access on the OCS, it remains, at the very least, an apparently unresolved issue at this juncture as to what the extent of the FERC authority under the OCSLA is to remedy **specific** instances of discriminatory behavior by pipelines on the OCS in violation of the OCSLA's open-access mandate.[6] Superior and Walter note that the Court of Appeals for the District of Columbia Circuit could address and clarify the extent to which the FERC possesses authority under the OCSLA to enforce open-access conditions in an adjudicatory, rather than rulemaking, proceeding when it issues its opinion on appeal of *Shell v. Transco, et al.* in *Williams Gas Processing – Gulf Coast Co, L.P., et al., v. FERC*, which is presently pending before the Court in Case Nos. 03-1179, et al.

Accordingly, and as set forth below, the MMS need not, and indeed should not, rush to implement a new and burdensome regulatory regime of its own under the OCSLA

Walter reached a settlement with Transco and Williams and withdrew their complaint in Docket No. RP02-144-000 prior to the conclusion of the hearing in that case.

when it is unclear to what extent such a regime is necessary or desirable given the FERC's own interpretation of *Williams* and its resulting authority to remedy specific violations of the OCSLA. While some additional form of regulation under the OCSLA may ultimately be necessary to enable the MMS to meet its own obligations under the statute, Superior and Walter urge the MMS to move cautiously with any such new initiative.

With the aforementioned in mind, Superior and Walter believe that the following guidelines should govern any proposed rulemaking proceeding initiated in response to the Advanced Notice.

1. Any Proposed Rule Should Minimize Burden to the Industry.

Any regulatory scheme established by the MMS should be light-handed in nature, and not be burdensome on the pipeline providers of service or those who have their gas gathered on them.[7] Superior and Walter concur with those commenters at the OCSLA Policy Workshops in Houston, New Orleans, and Washington D.C. who advocated that any rules be complaint-based, rather than relying on extensive and intrusive reporting requirements. The pipelines and shippers on the OCS are predominantly sophisticated companies that historically have been able to rely on private, arms-lengthy negotiations to establish by contract the rates and terms and conditions of service. While there have been instances of abuse (e.g. the complaints filed at the FERC against Transco and Williams in Docket Nos. RP02-99-000 and RP02-144-000), Superior and Walter do not believe that there exists at this time a rampant pattern of consistent denials of open-access

[6] This is particularly true with respect to the question of the degree to which the FERC has authority under the OCSLA to remedy discriminatory service or lack of service that is not "in connection with" an interstate pipeline.

service by pipelines that would merit an invasive regulatory or reporting regime. In particular, Superior and Walter are concerned that an invasive reporting scheme of rates and terms and conditions of service would act as a disincentive, rather than incentive, for pipelines and producers to reach agreement on rates and services to be provided. Invasive detailed data reporting unto itself is no guarantee against potential abuse, but is a guarantee of significant added overhead burdens to all parties involved. Further, the magnitude of information needed to be compiled in a timely manner to accurately reflect a specific justifiable rate for a given geographic area, considering the numerous complex economic variables unique to each offshore project, would lead one to believe such information would have limited to no practical use or value. The various segments of the industry should be permitted to continue to first rely on private contracts, with a complaint proceeding the subsequent proper recourse in the event that pipelines and producers cannot reach mutual agreement on reasonable rates and terms and conditions of service.

Towards that end, the establishment of an informal hotline phone number as a first resort for complainants (akin to the FERC's own complaint hotline) would be beneficial, with a more formal administrative hearing-type complaint procedure to follow if the dispute could not be resolved informally.

2. Production Feeder Lines and Production Handling Facilities Should not be Subject to any New MMS Regulations.

Contrary to the statements made by certain parties at the various OCSLA Policy Workshops, production feeder lines and production handling facilities should not be

[7] Due to the fact that the FERC regulates certain OCS pipelines pursuant to its authority under the Natural Gas Act ("NGA"), Superior and Walter are limiting these comments applicability to those pipelines that are

subject to any proposed MMS regulations. Production feeder lines and production handling facilities historically have been constructed and operated by those producers with a working or ownership interest in the gas leases and reserves to be produced from the fields to which they are interconnected. As such, these facilities are generally sized based on the estimated gas reserves to be produced. Thus, for example, contrary to a larger-diameter gathering or transportation pipeline, a production feeder line likely will have limited capacity beyond what has been constructed and committed to the interest owners. Third parties seeking access to such lines should not be permitted to effectively displace the owners' own production. The MMS must understand that these lines and facilities generally are limited in size and capacity, and the costs of requiring "open-access" to such facilities would be enormous. The regulation of production feeder lines and handling facilities would add significant costs to the development of gas fields on the OCS. Any additional regulatory costs and burdens on these facilities are unnecessary and counterproductive to the efficient development of the OCS gas resources.

In the event that the owners of production feeder or handling facilities are willing to expand such facilities to handle non-equity gas production, these types of arrangement are more properly the province of private negotiations and contracts, rather than mandatory access requirements promulgated by the MMS.

3. "Open Access" Cannot be Defined in a Vacuum.

There is always going to be a degree of inherent monopoly held by pipelines moving gas across the OCS due to the nature of the OCS and pipeline development costs. Not all differences in rates or terms and conditions of service between pipelines are de facto discrimination. "Open access" should be analyzed on a pipeline-specific basis and

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not regulated by the FERC under the NGA.

should be evaluated based on a pipeline's willingness to provide service at a reasonable, cost-based rate under reasonable terms and conditions without seeking to impose monopoly rents on the producer.

The key focal point when determining whether a producer or shipper is denied open-access is whether a pipeline insists upon unreasonably high rates and/or onerous terms and conditions of service entirely disproportionate to a producer's gas reserves base or the actual costs of providing the service in question. In other words, if a pipeline insists on unreasonably high rates and/or onerous terms and conditions of service, a producer, particularly in pipeline asset "Spin Down" cases where gas is already being delivered into that pipeline, generally has limited or no economic alternatives to having its gas shipped on the pipeline in question. This lack of alternative pipeline or production handling services are directly due to lack of economic incentives related to the high costs of constructing underwater pipelines or production handling facilities in the Gulf of Mexico when compared to a producer's risk adjusted estimated productive life of either a newly discovered reserves base or then remaining reserve base. It is in these circumstances that, in Superior and Walter's experience, certain pipelines have sought to impose onerous rates and/or terms and conditions because the pipelines are aware that the producer has no viable economic alternative for moving its gas to an other pipeline or production handling facility.

Accordingly, any MMS regulation must avoid establishing "cookie-cutter" rules, as the key inquiry as to whether open-access service is being denied is fact-specific. Thus, a complaint-driven regulation is most appropriate.

III.

Conclusion

WHEREFORE, Superior and Walter request that these initial comments be made part of the record of this proceeding.

Respectfully submitted:
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